

# GAP 12

## General Administrative Procedures

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October 2003

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Title	<b>Agency Agreements (made under HSWA section 13(1)(a) and (b)) and Memoranda of Understanding</b>
Contact	Openness and Communications Branch Rose Court Ext 6477
Content	This GAP sets out the Health and Safety Commission's policy on Agency Agreements and Memoranda of Understanding. It explains the legal basis on which an Agency Agreement or Memorandum of Understanding is made; the differences between an Agency Agreement and Memorandum of Understanding; the roles and responsibilities of those involved when an Agency Agreement or Memorandum of Understanding is required; Directorates' financial responsibilities and the arrangements to review the Agency Agreement or Memorandum of Understanding.
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# AGENCY AGREEMENT (AA)

## Introduction

This GAP provides guidance on:

- preparation of [Agency Agreements [SI 14](#)]; and
- cases where a [Memorandum of Understanding [SI 15](#)] may be more appropriate instead.

## General Background

- 12.1 This part of the GAP provides information on where Agency Agreements (AAs) are needed and gives instructions on how to develop and review Agency Agreements, including the role and responsibilities of Directorates/Divisions (D/Ds), Solicitors' Office, Openness and Communications Branch (OCB) and Planning, Efficiency and Finance Division (PEFD).
- 12.2 Section 13 of the [Health and Safety at Work etc Act 1975 [SE 1](#)] (HSWA) provides the legal basis for an AA. It gives the Health and Safety Commission (HSC) powers which allow the Health and Safety Executive (HSE) to tap into the expertise of others (or for others to tap into HSE's expertise) for the purposes of realising HSC/E's functions. (For information about Service Level Agreements, which are not covered by this GAP but which also provide for working arrangements between HSC/E and others, consult Safety Policy Directorate Branch B.)
- 12.3 Before negotiations about the content of an AA take place, the lead D/D should consult:
- Solicitors Office about the most appropriate form, and legal basis for the AA.
  - Openness and Communications Branch on whether the work is already subject to an existing AA.
  - PEFD, Finance Policy Unit about whether HSE should charge for any of the activities to be included in the AA.

## What is an Agency Agreement?

- 12.4 In this GAP an Agency Agreement means an agreement entered into by HSC under HSWA sections 13(1)(a) or (b) for a government department or other person to perform (with or without payment) any of the functions of HSC or HSE; or for HSC to perform functions of a Minister, government department or other public authority.
- 12.5 An AA is a formal document executed by affixing the Common Seal of the HSC.

- 12.6 The delegation of functions laid out in an AA does not shift the ultimate statutory responsibilities. For example, where an AA touches on enforcement it is HSC's responsibility to make adequate arrangements for that enforcement (HSCA section 18). An AA involves a shift of work, but not a shift of responsibility.

[**Content of Agency Agreement** - see **Annex A SI 16**] for a description of what an AA should contain.

## **Process/Sequence of Events**

- 12.7 The main steps to making an AA are:

- HSC/E approaches or is approached by government department(s), agency or other person(s) to undertake an area of work that they think should be subject to an AA.

### **1. [Agreement Checks SI 17]**

The relevant D/D consults:

- Solicitors' Office to ensure that the AA is consistent with HSC/E legal framework.
- OCB to see if the work is already the subject of an existing AA and confirmation that the proposal is consistent with HSC/E policy.
- PEFD, Finance Policy Unit to see if charges should be made and an outline of financial objectives. Reasons for no charge should be set out.

### **2. [Negotiation SI 18]**

- The lead D/D negotiates the AA and alerts the relevant Ministers.
- Solicitors' Office drafts the AA in consultation with the lead D/D and other relevant parties in HSE as to its content, roles and responsibilities. This includes PEFD Finance Policy Unit and PEFD FINU2 to see what charges should be made once a decision to recover costs is taken.
- D/D submits the final AA version to HSC and invite it to resolve to delegate the particular function.
- D/D also submits a draft letter to the Chair of the HSC to write to the HSE Director General (DG) directing HSE to perform the delegated function on HSC's behalf.

### **3. [Agreement and Record Keeping SI 19]**

- Secretariat arranges for draft letter to the DG to be typed and despatched, and for the HSC Common Seal to be placed on the AA.

- D/D ensures that all concerned parties execute the AA and hold the final signed version, as well as all subsequent revised agreements.
- D/D sends electronic copies to all interested parties, including OCB.
- OCB adds/amends details of the AA to a database and arrange for it to be published on the Intranet.
- D/D annually reviews the AA, especially any financial provisions and objectives.

### **[Review Procedures SI 20]**

12.8 An AA should be reviewed annually by the responsible D/D. It should be done with a 'lightness of touch' appropriate to the individual AA, and should:

- Examine, with the advice of Solicitors' Office, whether the AA is still legally correct.
- Seek advice from OCB that the AA continues to meet policy objectives.
- Seek advice from PEFD Finance Policy Unit and PEFD FINU2 that the level of charges are still appropriate to the level of work carried out.
- Where applicable, that it is still appropriate not to charge for a particular activity.
- Fully document, where applicable, the reasons why HSC/E continue not to make charges.
- Keep a formal record of each review.
- Notify OCB, who will update its AA database to include the date of the review or revised AA.

### **[Roles and Responsibilities SI 21]**

12.9 The roles and responsibilities for drawing up, maintaining and reviewing AA are:

#### **1. Directorates/Divisions (D/Ds)**

D/Ds are responsible for:

- Assessing the feasibility and desirability of entering into an AA with another government department.
- Seeking advice from our Solicitors' Office about the legal basis for entering into an AA.

- Seeking advice from OCB that an agreement does not already exist covering the area of work concerned, and ensuring that the proposed AA is, and continues to be, consistent with HSC/E policy.
- Seeking advice from PEFD Finance Policy Unit on financial matters, including costs, payments and financial reviews, and ensuring that PEFD Budget Unit is consulted on any budgetary implications.
- Negotiating the AA with other bodies and agencies, and instructing HSE Solicitors' Office who will draft the AA. Particular attention should be paid to entering into agreements with the devolved administrations - see [[GAP 10 SE2](#)].
- Alerting the relevant Ministers.
- Submitting the relevant papers to HSC for approval of the AA and inviting HSC to resolve to delegate its functions.
- Drafting and submitting a letter for the Chair of HSC to send to the HSE DG, directing HSE to perform the delegated function on HSC's behalf.
- Sending the signed letter from the Chair of HSC to the HSE DG.
- Ensuring that all involved parties execute the AA and hold the final version, as well as all subsequently revised agreements.
- Sending electronic copies of the AA to all relevant parties, including OCB.
- Initiating the review process, particularly of any financial objectives made by the agreement.

## **2. Solicitors' Office**

- HSE Solicitors' Office should be consulted at an early stage for advice on whether section 13 of HSWA affords power to enter into the kind of agreement contemplated; and whether the terms of the AA (in effect the terms of the 'contract') are correct and are to be made within HSC/E's powers and remit.
- If the AA deals with enforcement, Solicitors' Office should be consulted on whether the proposed arrangements are consistent with the section 18 of HSWA duty to make adequate arrangements for enforcement.

Solicitors' Office is responsible for:

- Drafting the AA on instructions from the D/D responsible for the negotiation.
- Providing advice on draft agreements received from other government departments.

- Providing advice when the AA is being reviewed.

### **3. *Openness and Communications Branch (OCB)***

OCB is responsible for:

- Advising the D/D at an early stage on whether the work is already subject to an existing AA.
- Providing general advice and guidance to the D/D on HSC/E's policy for dealing with the AA.
- Adding/amending the AA database on receipt of electronic copies, including any data from a review by the D/D.

### **4. *Planning, Efficiency and Finance Division (PEFD), Finance Policy Unit***

PEFD Finance Policy Unit is responsible for:

- Advising on charges, which should be sought at an early stage when negotiating a new AA or when reviewing an existing agreement, to enable full cost recovery to be met where appropriate. Normally, HSE should seek to recover the full economic cost of any work it carries out for another government department. PEFD Finance Policy Unit and PEFD FINU2 will advise on the level of charges to be made once a decision is taken to recover the costs.
- Advising the D/D when a decision is made not to recover full cost and setting out the reasons for this (e.g because the department/agency does work for HSE and the costs balance out).
- Advising the D/D on any review of financial arrangements contained in the AA.
- PEFD FINU2 gives advice on invoicing and payment arrangements in connection with the AA.

### **5. *Secretariat***

The Secretariat is responsible for:

- Arranging for the letter from HSC Chair to be typed and despatched to HSE DG, copied to the lead D/D.
- Arranging for the HSC Common Seal to be placed on the AA.
- Arranging for the relevant Ministers to be advised of the new or revised AA, via Health and Safety Sponsorship Division (HSSD), at Department for Work and Pensions.

# MEMORANDA OF UNDERSTANDING (MOUs)<sup>1</sup>

## General Background

- 12.10 This part of the GAP provides advice on the need for a [Memorandum of Understanding **SI 22**](MoU) and gives instructions to develop and review MoUs, including the role and responsibilities of Directorates/Divisions (D/Ds), Solicitors' Office, Openness and Communications Branch (OCB), Enforcement and Special Groups Branch (ESGB), and Planning, Efficiency and Finance Division (PEFD).
- 12.11 Before negotiations about the content of the MOU take place, D/Ds should consult:
- Solicitors' Office about the appropriateness of entering into a formal arrangement.
  - Openness and Communications Branch on whether the work is already the subject of an existing MOU.

## What is a Memorandum of Understanding (MOU)?

- 12.12 A MoU is an arrangement freely entered into by HSE with other government departments, non-departmental public bodies or external agencies. It is used to formalise new or existing working arrangements when it is not necessary or desirable to provide legal authority for the acts of, or create legal obligations to, such bodies or agencies.

A particular and widely used purpose for an MoU is to set out demarcation arrangements between HSE and another body or agency in circumstances where health and safety legislation overlaps with other, more specific, legislation enforced by other authorities. The purpose of the MoU is to avoid needless duplication of enforcement, whilst ensuring no areas of risk remain uncovered.

A MoU may be used to record arrangements for co-operation with a government body in another country which HSE would not wish to be regarded as having the force of a Treaty.

**[Content of Memorandum of Understanding - see Annex B **SI 23**]**for a description of the content of a MOU.

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<sup>1</sup> MoU may be described in other ways eg "concordat."

## Process/Sequence of Events

12.13 The main steps to making a MoU are:

- HSE approaches, or is approached by, government department(s), agency or other person(s) to formalise working arrangements, including arrangements for the enforcement of different health and safety legislation in the same place.

### 1. [MOU Checks SI 24]

The lead D/D checks with:

- Solicitors' Office to ensure the MOU is consistent with HSC/E legal framework.
- OCB to see if the work is already the subject of an existing MoU.
- ESGB to ensure the proposal is consistent with HSC/E policy, if the MOU involves demarcation of enforcement responsibilities.
- PEFD Finance Policy Unit to see if charges should be made and the financial objectives. Reasons for no charge should be set out.

### 2. [Negotiations SI 25]

- The lead D/D negotiates the MoU.
- Solicitors' Office drafts the MoU in consultation with the lead D/D and other relevant parties in HSE as to its content, roles and responsibilities.
- D/D submits the final MoU<sup>2</sup> version to their Director for approval.

### 3. [Record Keeping SI 26]

- D/D ensures that all concerned parties execute the MoU and hold the final signed version, as well as all subsequent revised arrangements.
- D/D sends electronic copies to all relevant parties, including OCB.
- OCB adds/amends details of the MoU to its database and arranges for it to be published on the Intranet.
- D/D determines how frequently the MoU needs to be reviewed. As guidance, it should be reviewed no less frequently than every three years, especially any financial provisions and objectives.

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<sup>2</sup> In some cases the Director General will sign an MoU on behalf of HSE.

## [Review Procedures SI 27]

12.14 When the D/D reviews the MoU it should normally:

- Examine, with the advice of Solicitors' Office, that the MOU is still legally correct.
- If it involves enforcement demarcation issues, seek advice from ESGB that it continues to meet policy objectives.
- Seek advice from PEFD FINU2 that the level of charges are appropriate to the amount of work carried out.
- If charges were not previously made and, in agreement with PEFD Finance Policy Unit, continues not to make charges for a particular activity, the reasons for not charging must be fully documented.
- Formally record each review.
- Notify OCB, who will update its MoU database to include the date the MOU was agreed or revised.

## [Roles and Responsibilities SI 28]

12.15 The roles and responsibilities for drawing up, maintaining and reviewing a MoU are:

### 1. Directorates/Divisions (D/Ds)

D/Ds are responsible for:

- Assessing the feasibility and desirability of formalising existing working arrangements into a MoU.
- Seeking advice from Solicitors' Office about the legal basis for entering into this arrangement.
- Seeking advice from OCB to ensure that the working arrangement is not already the subject of an existing MoU.
- Seeking advice from ESGB where appropriate to ensure that the proposed MoU is, and continues to be, consistent with HSC/E policy.
- Seeking advice from PEFD Finance Policy Unit on financial matters relating to the MoU, including costs, payment arrangements, financial reviews and ensuring that PEFD Budget Unit is consulted on all budgetary implications.

- Negotiating the MoU with other bodies or agencies and instructing HSE Solicitors' Office who will draft the MoU. Particular attention should be given to entering into arrangements with the devolved administrations - see [GAP 10 SE 3].
- Getting approval of the MoU. The D/D head will normally sign the MoU on behalf of HSC/E.
- Holding the final signed version of the MoU, including any changes.
- Sending electronic copies to all relevant parties, including OCB.
- Initiating the review process, particularly any financial objectives set by the MOU.

## *2. Solicitors' Office*

HSE Solicitors' Office is responsible for:

- Advising the D/D whether the MoU is within HSC/E's powers and that the terms of the MoU are appropriate.
- Drafting the MoU on instructions from the D/D responsible for the negotiation.
- Providing advice when the MoU is being reviewed.

## *3. Openness and Communications Branch (OCB)*

OCB is responsible for:

- Advising the D/D at an early stage on whether the work is already subject to an existing MoU.
- Adding/amending the MoU database records on receipt of electronic copies, including any data from a review.

#### *4. PEFD Finance Policy Unit*

PEFD Financial Policy Unit is responsible for:

- Advising on charges, which should be sought at an early stage when negotiating a new MoU or when reviewing an existing arrangement, to enable full cost recovery to be met where appropriate. Normally HSE should seek to recover the full economic cost of any work it carries out for another government department. PEFD FINU2 will advise on the level of charges to be made once a decision to recover the costs is taken.
- Advising the D/D when a decision is made not to recover full cost and to set out the reasons for this (e.g because the department/agency carries out work for HSE and costs balance out).
- Advising the D/D on any review of financial arrangements contained in the MoU.
- PEFD FINU2 will advise on invoicing and payment arrangements in connection with the MoU.

#### *5. Enforcement and Special Groups Branch (ESGB)*

ESGB is responsible for:

- Advising the D/D on whether HSC/E should create or continue MoUs where they relate to enforcement issues with other government departments, non-departmental public bodies or external agencies.
- Advising, if appropriate, on policy for any reviews of a MoU involving an overlap of enforcement issues.

## Content of an Agency Agreement (AA)

1. An AA should normally contain the following information:
2. The legislation under which the AA is being made.
3. The parties involved.
4. The roles and responsibilities of those involved.
5. Reference to details of any charging arrangements, including objectives and time scales (see [**Annex C SI 29**] para 12.18).
6. When the AA is to come into effect
7. Review arrangements (see [**Annex C SI 30**] para 12.20).
8. Arrangements to terminate the AA.

## Content of a Memorandum of Understanding (MoU)

12.17 A MoU should normally contain the following information:

1. The parties involved.
2. The roles and responsibilities of those involved.
3. The purpose of the MOU and any objectives, such as:
  - Joint co-operation between the parties where enforcement responsibilities interface or overlap including provision of effective co-ordination of enforcement activities and minimal duplication of effort.
  - Establishment of a framework for liaison.
  - Description of the interfaces between the parties.
  - Establishment of a mechanism for resolving difficulties.
  - A record of financial objectives.
4. The legislation under which each of the parties operates (if applicable).
5. Working arrangements, ideally at both summary and detailed level. This should cover in summary issues such as the establishment and role of any working group, and information exchange arrangements, e.g provision of quarterly inspection reports. The more detailed level of the MoU should cover the day-to-day workings, e.g who does what, and who reports to whom. This should preferably be set out under each individual piece of legislation for which the respective parties are responsible, and their respective enforcement role.
6. Arrangements to review the MOU.
7. Arrangements to terminate the MoU.

## General Financial Considerations

12.18 Under section 13 (1)(g) of [HSWA [SE 4](#)], Directorates can charge for services that are provided outside of their statutory monopoly. The section says:

*“(g) to include, in any arrangements made by the Commission for the provision of facilities or services by it or on its behalf, provisions for the making of payments to the Commission or any person acting on its behalf by other parties to the arrangements and by persons who use those facilities or services”.*

HSC/E should aim to recover the costs of any work it undertakes on behalf of another party, or make payments when others perform functions of the HSC or HSE. Details of the relevant financial arrangements and services for which HSC/E can make charges can be found in section 4.8 of the **[Planning and Resources Guide [SE 5](#)]**. If costs are not to be recovered this will need to be agreed with PEFD Finance Policy Unit, and the reasons for not charging fully documented.

12.19 The scope of such discretionary services is not legally defined. Management is therefore able, as part of its planning process, to define the scope of the service in accordance with customer demands, and the structure of the organisation.

12.20 It is unlikely that the terms of a MOU will change during its lifetime. However, since HSC seeks to recover the costs associated with such work it is likely that the level of charges will change, no more than annually. To avoid having to resubmit the entire MOU to HSC for approval when the only change is to the level of charges, it is suggested that the MOU makes reference to associated charges and review, but does not include any details. The detail of the level of charges; yearly review etc. can then be set out in a separate document to the MOU. Changes to the level of charges may be agreed by an exchange of correspondence. Solicitors' Office can advise on appropriate wording to cover this situation when preparing the MOU and PEFD Finance Policy Unit and FINU2 will advise on the level of charges to be made.